Doctors' Hospital of Montclair *and* Retail Clerks Union Local 1428, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 31-CA-11510

March 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on September 14, 1981, by Retail Clerks Union Local 1428, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC, herein called the Union, and duly served Doctors' Hospital of Montclair, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on October 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 7, 1981, following a Board election in Case 31-RC-4837, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 25, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 3, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 27, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause, as in its answer to the complaint, Respondent contends that it is not obligated to bargain with the Union because the certification issued to the Union in Case 31-RC-4837 is invalid by reason that the Board erred in its determination that an appropriate unit for bargaining is the unit set forth in the Acting Regional Director's Decision and Direction of Election. Respondent further contends that the Board erred in overruling its objections to the election.

The General Counsel submits that Respondent's contentions should be discounted as attempts to relitigate issues which were or could have been disposed of by the Board in the prior representation proceeding. We agree.

A review of the entire record, including that in Case 31-RC-4837, reveals that pursuant to a petition filed by the Union on July 18, 1980, a representation hearing was held on August 12 and 13, 1980. Thereafter, on September 24, 1980, the Acting Regional Director for Region 31 issued a Decision and Direction of Election in which he found appropriate a unit of all professional employees employed by Respondent at its facility at 5000 San Bernardino Street, Montclair, California, but excluding office clerical employees, physicians, registered nurses, contract employees, guards, all other employees and supervisors as defined in the Act, as amended. On October 3, 1980, Respondent filed a request for review of the Acting Regional Director's Decision and Direction of Election on the ground that the Acting Regional Director erred in excluding registered nurses from the bargaining unit found appropriate. On October 27, 1980, the Board granted Respondent's request for review. Thereafter, on October 31, 1980, pursuant to the Decision and Direction of Election referred to above, an election by secret ballot was held. The ballots were impounded pending issuance of the Board's Decision on Review and Direction.

On March 12, 1981, the Board issued its Decision on Review and Direction affirming the decision of the Acting Regional Director as to the appropriateness of the unit and directing that the bal-

[1] Official notice is taken of the record in the representation proceeding, Case 31-RC-4837, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the N.L.R.A., as amended.

lots be opened and counted.[2] Pursuant thereto, the ballots were opened and counted on March 27, 1981. The final tally disclosed that, of approximately 13 eligible voters, 7 cast votes in favor of the Union, and 3 against. There was one challenged ballot which was not sufficient to affect the outcome of the election.

On April 12, 1981, Respondent filed Objections to Conduct of Election and Conduct Affecting Results of Election. On May 7, 1981, the Regional Director for Region 31 issued a Supplemental Decision and Certification of Representative, overruling Respondent's objections and certifying the Union as the exclusive representative of the employees in the unit found appropriate. Respondent timely filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative. On June 30, 1981, the Board denied Respondent's request for review.

Thereafter, the Union, by letter dated August 11, 1981, requested Respondent to bargain with it collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Respondent, by letter dated August 25, 1981, refused the Union's request to bargain, stating that the Board had improperly certified the Union.

In its answer to the complaint, and in its response to the Notice To Show Cause, Respondent alleges two affirmative defenses. First, it alleges that the Board erroneously determined the appropriateness of the certified unit. Second, it alleges that the Board erred in overruling its objections to the election.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

[2] Reported at 254 NLRB 1374.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and principal place of business located in Montclair, California, where it is engaged in the operation of a proprietary hospital. Its annual gross revenues exceed $250,000. Annually it purchases and receives goods or services valued in excess of $2,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Retail Clerks Union Local 1428, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All professional employees employed by Respondent at its facility located at 5000 San Bernardino Street, Montclair, California, but excluding office clerical employees, physicians, registered nurses, contract employees, guards, all other employees, and supervisors as defined in the Act as amended.

2. The certification

On October 31, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 7, 1981, and the Union continues to be

such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 11, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 25, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 25, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Doctors' Hospital of Montclair is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Retail Clerks Union Local 1428, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. All professional employees employed by Respondent at its facility located at 5000 San Bernardino Street, Montclair, California, but excluding office clerical employees, physicians, registered nurses, contract employees, guards, all other employees and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since May 7, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about August 25, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Doctors' Hospital of Montclair, Montclair, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Clerks Union Local 1428, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All professional employees employed by Respondent at its facility located at 5000 San Bernardino Street, Montclair, California, but excluding office clerical employees, physicians, registered nurses, contract employees, guards, all other employees and supervisors as defined in the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Montclair, California, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Clerks Union Local 1428, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All professional employees employed by the Employer at its facility located at 5000 San Bernardino Street, Montclair, California, but excluding office clerical employees, physicians, registered nurses, contract employees, guards, all other employees and supervisors as defined in the Act as amended.

DOCTORS' HOSPITAL OF MONTCLAIR